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# Republican Policy Committee

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## Anticipating Bernard Nussbaum's Whitewater Testimony

### **The Foster Papers: 'Ethically and Legally Obligated' . . . Or Stonewalling?**

The first weeks of the hearings by the Special Committee to Investigate Whitewater Development Corporation and Related Matters have focused on the often contradictory and convoluted explanations and excuses offered by White House officials for their mishandling of the Whitewater papers that were in Deputy White House Counsel Vincent Foster's office at the time of his death.

In a strongly-worded editorial last month, the *New York Times* said:

[S]omeone in the Government recognized that the White House was contaminating the investigation and had the integrity to say so. . . This is stuff that was buried in secrecy and almost covered over by last summer's easygoing hearings run by the President's party. It may or may not lead to legal charges, but there is no question about the public value of exposing official bungling and lying. . . . Two days after Mr. Foster's death, Deputy Attorney General Philip Heymann told Bernard Nussbaum, the White House counsel, that he was "messing this up very badly" and "making a terrible mistake" by keeping Justice Department lawyers from looking at papers in Mr. Foster's office. If the President's lawyer and the White House staff had taken a reasonable approach to securing and preserving evidence, these Republican-led hearings would have been unnecessary. ["Whitewater: New Ground," *New York Times*, 7/23/95]

Whether the White House is guilty of official bungling, lying, or both, one result of their efforts is clear: They succeeded completely in keeping the Whitewater papers out of the hands of law enforcement officers and the Department of Justice in the period following Foster's death.

In an article published on the eve of his Special Committee testimony, "What I Did and Why I Did It" [*New York Times*, 8/8/95], White House counsel Bernard Nussbaum claims: "I was ethically and legally obliged to protect the confidentiality of *all* the files in Mr. Foster's office" (emphasis added).

Such a sweeping assertion cannot stand up to legal analysis. Nussbaum has made no explanation as to how his supposed obligation to protect all Foster's files can be squared with the events of that night, when he permitted two White House aides who were not employed in the White House Counsel's Office to search the office and possibly remove files. Though it seems plain that Nussbaum had a duty to protect *some* of Foster's files, he could have done so without interfering with the responsibilities of federal law enforcement agencies.

Defenses Nussbaum has used to explain why he prevented a standard law-enforcement investigation of his deputy's death include national security, executive privilege, attorney work-product privilege, and attorney-client privilege. This paper briefly addresses each, and suggests that none is valid.

## **Background: The Late Night Search**

Foster's duties as Deputy White House Counsel, under Bernard Nussbaum, were to provide legal advice to the President on official matters. However, in an arrangement of questionable legality, the President and Mrs. Clinton also relied on Foster to handle various personal legal and financial matters, including the Whitewater affair. It was for that reason that Foster's White House office contained a file or files of Whitewater papers.

On the evening of July 20, 1993, a few hours after Foster's tragic death, Bernard Nussbaum, Patsy Thomasson, and Margaret Williams entered his unsecured office. They searched for about an hour. Nussbaum, as White House Counsel, was Foster's superior. But Thomasson and Williams had no known official reason to be there.

Thomasson was deputy to David Watkins, the White House Director of Management and Administration. She says she was sent by Watkins to look for a suicide note. (Watkins, who apparently could not wait for an official search, had agreed to seal Foster's office, according to the Park Police.) While there, according to testimony, Thomasson sat at Foster's desk while going through his files. Williams was First Lady Hillary Rodham Clinton's chief of staff. She testified that after hearing of Foster's death, she drove to the White House from her home and went into his office in the hope he might be there, still alive.

Nussbaum, Thomasson and Williams disagree on critical points, such as who entered first and who left last. Thomasson says that Williams was already there when she and Nussbaum entered together. Nussbaum says Williams and Thomasson were already there when he entered alone. Williams testified that Thomasson remained when she and Nussbaum left. Thomasson says that Williams left first, then she and Nussbaum left together. And, Nussbaum says that all three left at the same time. But all deny taking anything from the office that night.

Williams' testimony on July 26, 1995, to the Special Committee was:

I took nothing from Vince's office. I didn't go into Foster's office with anything in mind concerning any documents that might be in his office. I did not look at, inspect, or remove any documents. [New York Times, 7/27/95]

Her testimony was flatly contradicted by Henry P. O'Neill, a Secret Service agent on duty at the White House that night. O'Neill, an 18-year veteran of the uniformed service, testified before the Special Committee on the same day:

I saw Maggie Williams walk out of the suite and turn to the right in the direction that I was standing. She was carrying what I would describe, in her arms and hands, as folders. . . . I am not in any doubt about it, sir. [New York Times, 7/27/95]

When Park Police arrived to search the office on July 21, Nussbaum turned them away, citing "national security." On July 22, two senior Justice Department attorneys came with Park Police and FBI agents. They were acting under what they believed was an agreement between Nussbaum and Deputy Attorney General Heymann that the Justice Department lawyers would review the files with Nussbaum to determine what should be turned over to the law enforcement agencies. Nussbaum denies having made such an agreement.

## The Nussbaum Defenses

Bernard Nussbaum, over the course of the last two years, has offered the following explanations for his actions in the days following Foster's death.

**National security.** Patsy Thomasson, who sat at Foster's desk the night of his death going through his files, had no security clearance. If in fact Foster's office contained national security information, the Special Committee may well ponder the implications of federal law which makes it a crime (1) to allow, through gross negligence, national security information to fall into the hands of unauthorized persons, and (2) to fail to make a prompt report that national security information has been "removed from its proper place of custody or delivered to anyone in violation" of its trust. . . . [18 USC § 793(f) (1988 ed.)].

In any event, the Whitewater papers had no connection to national security matters.

**Executive privilege.** Executive privilege protects certain confidential communications between the President and his advisers from forced disclosure to Congress or the courts. Though not explicit in the Constitution, it is grounded in the separation of powers — the need for each branch of government to exercise its constitutionally assigned powers independently of the other two. As C. Boyden Gray, White House Counsel under President Bush, has pointed out, executive privilege cannot be asserted by the White House against the Justice Department, as both are components of the executive branch. Deputy Attorney General Philip Heymann also has said that it does not make sense to assert executive privilege against the Justice Department, a component of which, the Office of Legal Counsel, is responsible for protecting the executive privilege.

The Whitewater papers dealt not with executive branch deliberations, but with the President and Mrs. Clinton's personal legal and financial affairs. No claim of executive privilege could possibly apply.

**Attorney work-product privilege.** The attorney work-product privilege, as Nussbaum writes in his *New York Times* piece, "shields materials prepared by a lawyer in anticipation of litigation." This shield, however, protects against forced disclosure of the lawyer's work to his adversary in litigation.

The White House Counsel's Office does not itself conduct litigation. Litigation in which the White House has an interest is prosecuted or defended by the Justice Department. If a White House lawyer prepares a document in anticipation of litigation, it is for the Justice Department's use. Nussbaum in effect is attempting to assert the work-product privilege against the White House's own litigators.

**Attorney-client privilege.** The attorney-client privilege protects confidential communications between a lawyer and a client in the course of seeking legal advice. Since Nussbaum served as White House Counsel, the privilege would apply to confidential communications on official legal matters between the President and Nussbaum. The privilege would continue to apply if Nussbaum had delegated an official matter to a subordinate lawyer, including Foster, or when information was handled by nonlawyer support staff in the counsel's office, to the extent necessary for support staff to assist a lawyer's work.

Given the nature of Foster's duties, it is reasonable to assume that his office might have contained attorney-client privileged material *concerning official matters*. But, then, why did Nussbaum allow Thomasson and Williams to search the office? Neither had any known official reason to be there. They had no duties in the White House Counsel's office and did not work under Nussbaum's supervision, yet Thomasson sat at Foster's desk searching through his files, and there is testimony that Williams removed files. "Waiver occurs where privileged information is disclosed to a third party." [Stephen A. Saltzburg, *Federal Rules of Evidence Manual*, vol. 2, p. 610 (6th ed. 1994).] For purposes of the attorney-client privilege with respect to the work of the White House Counsel's office, Thomasson and Williams were third parties.

In that light, Nussbaum's conduct is not explainable in terms of his obligation to guard the attorney-client privilege. For anything in Foster's office that was privileged before the late-night search, the privilege was risked or destroyed altogether by the time the searchers left.

The Whitewater papers, of course, were personal to the Clintons and did not relate at all to the work of the White House Counsel's office. So why did Nussbaum's duties as White House Counsel require him to keep these papers out of the hands of law enforcement officials? His recent article does not say.

The Whitewater papers might not have been privileged even in Foster's hands. "The privilege protects communications, not underlying facts. . . . Similarly, the privilege does not protect documents that were prepared independently of any communication between the attorney

and the client — such as corporate or business records preexisting the attorney-client relationship." [Stephen A. Saltzburg, *Federal Rules of Evidence Manual*, vol. 2, p. 595-96 (6th ed. 1994).] To the extent the Whitewater papers contained documents indicating the facts underlying the Clintons' Whitewater transactions, as distinguished from confidential communications seeking legal advice, the papers were not privileged.

## **Why, Then, Was An Investigation Blocked?**

No matter what documents were in Foster's office, valid claims of privilege could have been protected without interference with law enforcement. The papers could have been inventoried and secured after Foster's death. Then, there would have been no opportunity for documents to be lost, altered, or destroyed, and claims of privilege could have been resolved at a later time through discussions with the Justice Department.

However, from the White House perspective, there was one disadvantage to a standard investigation: the Whitewater papers would have been inventoried and secured and ultimately turned over to law enforcement officers. Nussbaum deserves tough questions, and the Special Committee still faces the difficult task of reconstructing the Foster papers and determining where the evidence leads.

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